

(2)
No. 90-540

FILED

OCT 16 1990

JOSEPH E. SPANIO, JR.
CLERK

IN THE

Supreme Court of the United States

October Term, 1990

VINCENT J. VACCARO,

Petitioner,

against

THOMAS C. JORLING, as Commissioner of the New York
State Department of Environmental Conservation,

Respondent.

ON WRIT OF CERTIORARI TO THE APPELLATE DIVISION, SUPREME
COURT OF NEW YORK, THIRD JUDICIAL DEPARTMENT

Brief in Opposition to Petition for Writ of Certiorari

ROBERT ABRAMS

Attorney General of the State of New York
Attorney for Respondent

The Capitol
Albany, NY 12224
(518) 474-8890

O. PETER SHERWOOD
Solicitor General

PETER H. SCHIFF
Deputy Solicitor General

PETER G. CRARY
Assistant Attorney General
of Counsel

Dated: October 15, 1990

THE REPORTER COMPANY, INC., Walton, NY 13856—800 252-7181—1990

(4426)

BEST AVAILABLE COPY

i.

Question Presented

Where the New York Courts have concluded that the State's acquisition of wild forest land in the Adirondack Park for addition to New York's constitutionally protected forest preserve serves a valid public purpose, does petitioner's assertion to the contrary raise a substantial federal question?

Table of Contents.

	Page
Question Presented	i
Statement of the Case.....	1
ARGUMENT:	
The writ should be denied for the proposed acquisition of land to the Adirondack Forest Preserve does not raise a Federal question	4
Conclusion	6

TABLE OF AUTHORITIES.

CASES:

Adirondack Railway Co. v. New York State, 176 US 335 (1900)	4, 5
Berman v. Parker, 348 US 26 (1954)	5
Hawaii Housing Authority v. Midkiff, 467 US 229 (1984).....	4
Joslin Manufacturing Co. v. City of Providence, 262 US 668 (1923).....	5
North Laramie Land Co. v. Hoffman, 268 US 276 (1925).....	5

iii.

	Page
STATE STATUTES:	
CPLR 5601(b)	3
Eminent Domain Procedure Law, Article 2	2
Eminent Domain Procedure Law § 207.....	3
Environmental Bond Act of 1972.....	2
Environmental Conservation Law § 9-0101(1)	1
§ 9-0101(6)	1
§ 9-0105(7)	2, 5
§ 51-0701(1)	2, 5
§ 51-0703(1)	2
STATE CONSTITUTION:	
Article 14, § 1	2, 4

No. 90-540

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990.

VINCENT J. VACCARO,

Petitioner,

against

THOMAS C. JORLING, as Commissioner of the New York
State Department of Environmental Conservation,

Respondent.

ON WRIT OF CERTIORARI TO THE APPELLATE DIVISION,
SUPREME COURT OF NEW YORK, THIRD JUDICIAL DE-
PARTMENT

Brief in Opposition to Petition for Writ of Certiorari

Statement of the Case

The Adirondack Park is a six million acre patchwork of public and private lands in northern New York. New York Environmental Conservation Law (ECL) § 9-0101(1). Approximately 40% of the park is owned by the State and is known as the "forest preserve". ECL § 9-0101(6). The

natural resources and open space of the Adirondack Park are unique and time-honored assets of New York State. For more than a century, New York's Constitution has sought to preserve the wild forest character of the State's Adirondack forest preserve. Toward that end, Article 14, § 1, of that Constitution provides:

The lands of the state, now owned or hereafter acquired, constituting the forest preserve as now fixed by law, shall be forever kept as wild forest lands. They shall not be leased, sold or exchanged, or be taken by any corporation, public or private, nor shall the timber thereon be sold, removed or destroyed.

ECL § 9-0105(7) authorizes the New York State Department of Environmental Conservation to acquire lands within the Adirondack Park which are "deemed necessary for the enlargement of the forest preserve or for the conservation of the lands, forests and waters within the state . . .". New York's Environmental Bond Act of 1972 in turn allocated \$44 million for the acquisition of land as additions to the Adirondack forest preserve. ECL §§ 51-0701(1); 51-0703(1).

The petitioner is the owner in fee of a 1063 ± acre parcel of wild forest land in the Adirondack Park, known as the "Pine Lake property". This parcel is entirely surrounded by state-owned forest preserve land and contains two lakes, a section of the South Branch of the West Canada Creek, several streams and a wetland.

Following a public hearing pursuant to Article 2 of the Eminent Domain Procedure Law (EDPL), the Commissioner of Environmental Conservation issued a determination ordering the appropriation of the Pine Lake property

(Pet, pp. 38-44). The Commissioner found that this acquisition would serve a public purpose, "regardless of the availability of other land for acquisition or the existence of other land in the Forest Preserve" (Pet, pp. 40-41). Specifically, the Commissioner determined in pertinent part that the acquisition would consolidate state-owned forest preserve land, provide additional public recreational opportunities and protect natural resources from development (Pet, p. 43).

Pursuant to EDPL § 207, petitioner commenced a proceeding in the Appellate Division of New York State Supreme Court to review the Commissioner's determination. The Appellate Division confirmed the determination, holding that the proposed acquisition was within the Commissioner's statutory authority and would serve a valid public purpose (Pet, pp. 27-37).

Thereafter, petitioner filed a notice of appeal to the Court of Appeals on constitutional grounds pursuant to CPLR 5601(b).¹ On April 3, 1990, the Court of Appeals dismissed that appeal *sua sponte* upon the ground that no substantial constitutional question is directly involved (Pet, pp. 25-26). ____ NY2d _____. Petitioner then sought leave to appeal to the Court of Appeals, which was denied on June 28, 1990. ____ NY2d _____. Petitioner now seeks a writ of certiorari in this Court.

¹That provision provides in pertinent part for an appeal of right to the Court of Appeals:

"1. From an order of the appellate division which finally determines an action where there is directly involved the construction of the constitution of the state or of the United States; * * *".

ARGUMENT

The writ should be denied for the proposed acquisition of land to the Adirondack Forest Preserve does not raise a Federal question.

The courts below correctly concluded that petitioner failed to raise a meritorious constitutional claim. Courts will defer to a state legislature's judgment as to what constitutes a public use unless it is shown to lack all reasonable foundation. *Hawaii Housing Authority v. Midkiff*, 467 US 229 (1984). This Court long ago recognized that the addition of lands to the Adirondack forest preserve constitutes a valid public purpose. *Adirondack Railway Co. v. New York State*, 176 US 335, 349 (1900). Article 14 § 1 of the New York Constitution establishes that the protection for future generations of the wild forest lands constituting the Adirondack forest preserve provides an important public benefit to the people of this state. Noting this State's constitutional and statutory protection of the forest preserve, this Court stated in *Adirondack Railway, id.*, that the "lands taken for the park were thereby dedicated to a public use regarded by the State as of such vital importance to the people that they were expressly put by the constitution beyond the reach of any other destination".

The specific objectives of the proposed acquisition will provide significant public benefits as well. Since the Pine Lake property is an "in-holding" entirely surrounded by forest preserve, its acquisition would eliminate the existing potential for trespassing on private land and illegal timber cutting on state land. Protecting the parcel's natural resources from future development and providing additional public recreational opportunities are also undeniably public purposes.

Petitioner argues that the State has failed to establish either (1) the necessity for adding more land to the forest preserve or (2) the need to acquire this parcel in particular. As noted, ECL § 9-0105(7) authorizes the acquisition of lands for addition to the Adirondack forest preserve and ECL § 51-0701(1) allocates \$44 million for that specific purpose. This Court has long recognized that the necessity of exercising the power of eminent domain for what is undeniably a public use is a legislative determination that is not subject to judicial oversight. *Joslin Manufacturing Co. v. City of Providence*, 262 US 668, 678 (1923); *North Laramie Land Co. v. Hoffman*, 268 US 276, 284 (1925). Thus, courts will not review the size of a public project area such as the Adirondack forest preserve. See, *Berman v. Parker*, 348 US 26, 35-36 (1954). Nor will they review the necessity for appropriating a particular parcel to accomplish a public purpose. *Adirondack Railway Co. v. State of New York*, *supra*, 176 US at 349.

There is no merit to this petition for certiorari, for the courts of New York have concluded that the proposed acquisition serves a public purpose and no federal question appears in this case.

CONCLUSION

The petition for a writ of certiorari should be denied.

Dated: Albany, New York
October 15, 1990

Respectfully submitted,

ROBERT ABRAMS
Attorney General of the State of New
York
Attorney for Respondent

O. PETER SHERWOOD
Solicitor General

PETER H. SCHIFF
Deputy Solicitor General

PETER G. CRARY
Assistant Attorney General

of Counsel